(6)

No. 03-1250

Supreme Court, U.S.
FILED
DEC 30 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, FRANK TIBERIO, d/b/a FAIRFIELD TOWING, LAFOND EXPRESS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY, MID-CON FREIGHT SYSTEMS, INC., H & H ENTERPRISES, INC., d/b/a S & M CARTAGE, INC., ECONOMY TRANSPORT, INC., MASON & DIXON LINES, INC., ROMEO EXPEDITORS, INC., WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., GERRIG'S TRUCKING & LEASING, INC. and BESTWAY EXPRESS, INC., individually and on behalf of all others similarly situated,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, MICHIGAN DEPARTMENT OF TREASURY, MICHIGAN DEPARTMENT OF COMMERCE, AND THE STATE OF MICHIGAN,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Court Of Appeals

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT E. MCFARLAND*
FOSTER, SWIFT, COLLINS & SMITH, P.C.
32300 Northwestern Highway, Suite 230
Farmington Hills, MI 48334
(248) 539-9900

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE 1

A. The Implicated Michigan Intrastate Fee Is A Fee Charged To Engage In Intrastate Transportation 1

B. The Michigan Intrastate Regulatory Fee Constitutes A Burden On Interstate Commerce For All Carriers 2

C. Petitioners Developed Below That The Intrastate Fee Is Unrelated To A Remaining Permissible Regulatory Purpose 3

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

Federal Express Corporation v. California Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979, 112 S. Ct. 2956, 119 L.Ed.2d 578 (1992), *on remand*, 1993 W.L. 399380 (N.D. Cal. 1993) (unpublished) 4

Morales v. Trans World Airlines, Inc., 504 U.S. 374, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992) 1

STATUTES AND REGULATIONS

Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, 108 Stat. 1605 1

ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 2

Michigan Motor Carrier Act, MCL 475.1, *et seq.* 1

MCL 478.2(1) 2

MISCELLANEOUS

H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess. 87 (1994) 2

"Motor Carrier Fee Revenue and Expenditures," *Michigan Senate Fiscal Agency Memorandum* (October 24, 1994) 4

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

A. The Implicated Michigan Intrastate Fee Is A Fee Charged To Engage In Intrastate Transportation.

The Brief of the *amicus curiae* United States posits, at p. 18, that "the mere levying of a fee is not 'related to a price, route, or service of any motor carrier' for purposes of Section 601" of the Federal Aviation Administration Authorization Act of 1994 (F4A), Pub. L. No. 103-305, 108 Stat. 1605. The United States submission ignores the fact that this is not "any tax or fee" but a fee directed particularly to the ability of a motor carrier to conduct intrastate transportation in Michigan. It is a fee the payment of which is a condition precedent to the operation of intrastate truck transportation in Michigan and is the very same fee which was employed to support the economic regulation, the foundational purpose of the Michigan Motor Carrier Act (MMCA), MCL 475.1, *et seq.*, as enacted in 1933. That is why the continued assessment of this intrastate regulatory fee on all carriers conducting intrastate hauls, virtually all of which also conduct interstate transportation under the economically deregulated federal regime, transgresses the "broad and important" preemptive purposes of Section 601 as supported by *Morales v. Trans-World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992).

B. The Michigan Intrastate Regulatory Fee Constitutes A Burden On Interstate Commerce For All Carriers.

The Brief of the United States as *amicus curiae* acknowledges, at p. 12, that the intrastate decal fee imposed at MCL 478.2(1) "affects interstate commerce." Again, virtually all carriers operating in Michigan intrastate commerce conduct interstate operations as well, given the economically deregulated federal structure contained in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. In fact, Section 601(a)(1), when enacted, set forth specific congressional findings that:

> (1) The regulation of intrastate transportation of property by the states has –
>
> (A) Imposed an unreasonable burden on interstate commerce;
>
> (B) Impeded the free flow of trade, traffic and transportation of interstate commerce; and
>
> (C) Placed an unreasonable cost on the American consumers . . .

108 Stat. 1605. As detailed with specificity in the Conference Report accompanying the F4A, the myriad and complex state-by-state regulation of intrastate truck operations had caused profound "inefficiencies, increased costs, reduction of competition, [and] inhibition of innovation and technology." H.R. Conf. Rep. No. 677, 103rd Cong., 2d Sess. 87 (1994). Included among those increased costs were regulatory fees, such as the implicated Michigan intrastate fee, charged solely for the privilege of moving a single intrastate shipment with a power unit in a carrier's fleet.

The Brief of *amicus curiae* United States notes, at p. 17, that:

> Indeed, Congress's determination in the SSRS that a fee exceeding $10 for interstate hauls would unduly burden interstate commerce suggests that a charge ten times that amount for 'topping off' an interstate load warrants review by the Court.

Likewise, the disparity between the Michigan intrastate fee and the SSRS fee leads to the same conclusion for all carriers. The regulatory function of the MPSC for an existing intrastate carrier is limited to the supervision of insurance filings in the same manner as is done for an SSRS interstate carrier, plus those duties attendant to the collection of the challenged annual intrastate fee of $100 per power unit. The imposition of that fee in and of itself constitutes a continued unreasonable burden on interstate commerce in violation of Section 601. The assessment of that fee means that Michigan has never leveled the playing field for air and ground carriers, although that was a primary motivation of Congress in the initial passage of the preemption. This action by Michigan is a direct affront to the Commerce Clause and thereby warrants this Court's review.

C. Petitioners Developed Below That The Intrastate Fee Is Unrelated To A Remaining Permissible Regulatory Purpose.

The Brief of the United States also concedes that the fee might fail if it "substantially exceeded the amount Michigan required to administer lawful [non-prempted] programs." (U.S. *amicus curiae* Brief, p. 19). Of course, California attempted to continue the imposition of motor

carrier fees on the air carrier Federal Express Corporation, even after such economic regulation was held preempted in that case, the precursor to the F4A preemption. See *Federal Express Corporation v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979, 112 S. Ct. 2956, 119 L.Ed.2d 578 (1992), *on remand*, 1993 W.L. 399380 (N.D. Cal. 1993) (unpublished). On remand there, the court enjoined the imposition of motor carrier regulatory fees against air carrier Federal Express Corporation, although the State argued that the fees were imposed for non-preempted safety purposes. The court stated there that the fee "cannot be said to harmonize with the Deregulation Act by supporting an isolated class of acceptable regulation." *Id.* at *7.

Here, Petitioners did present evidence to the Court below that, of the over $63 million generated by the MMCA's fee provisions for Michigan fiscal years 1982-1983 through 1994-1995, only 27% had been utilized for direct MPSC regulatory purposes. "Motor Carrier Fee Revenue and Expenditures," *Michigan Senate Fiscal Agency Memorandum* (October 24, 1994), p. 4, submitted below with Plaintiffs' Response to Defendants' Motion for Summary Disposition. The same continued after the F4A preemption took effect, with only three individuals on the MPSC staff currently assigned to the "safety and complaints" function. This challenged intrastate fee is guilty of much more than association with preempted purposes. (U.S. *amicus curiae* Brief, p. 19). It represents the very burden on interstate commerce that Congress intended to end. The intrastate fee is in direct contravention of the preemption enacted by Section 601.

CONCLUSION

As in the other two Petitions for Writ of Certiorari filed with this Court in No. 03-1234 and No. 03-1230, the Petition for Writ of Certiorari in No. 03-1250 should be granted because of the significance of the questions involved in this direct state challenge to federal preemption.

Respectfully submitted,

ROBERT E. MCFARLAND*
FOSTER, SWIFT, COLLINS & SMITH, P.C.
32300 Northwestern Highway, Suite 230
Farmington Hills, MI 48334
(248) 539-9900

**Counsel of Record*